1605 COMMERCIAL GAMBLING: SETTING UP OR COLLECTING THE PROCEEDS OF A GAMBLING MACHINE — § 945.03(1m)(e)

Statutory Definition of the Crime

Commercial gambling, as defined in § 945.03(1m)(e) of the Criminal Code of Wisconsin, is committed by one who intentionally [sets up a gambling machine for use for the purpose of gambling] [or] [collects the proceeds of a gambling machine].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][2] elements are present.

Elements of the Crime That the State Must Prove

1. The machine in question was a gambling machine.

   A "gambling machine" is a device which for a consideration[3] affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.[4]

   [The phrase "chance, even though accompanied by some skill," means that chance must predominate over skill in determining the outcome of the game.][5]

   ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

["Gambling machine" does not include an amusement device if it rewards the player exclusively with one or more nonredeemable free replays for achieving certain scores and does not change the ratio or record the number of the free replays so awarded.][6]

2. The defendant intentionally [set up the gambling machine for use for the purpose of gambling] [or] [collected the proceeds of the gambling machine].[7]

This means that the defendant knew that the machine was being used for gambling and knew that the proceeds were derived from gambling.[8]

ADD THE FOLLOWING AS A THIRD ELEMENT IF THE CHARGE INDICATES OR THERE IS EVIDENCE THAT THE ALLEGED VIOLATION OCCURRED ON LICENSED PREMISES.[9]

[3. The defendant intentionally (set up for the purpose of gambling) (or) (collected the proceeds of) six or more gambling machines.]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that [both] [all three][10] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1605 was originally published in 1996 and revised in 1999, 2000, and 2002. The 2002 revision adapted the instruction to the new format and added the third element for certain types of cases. This revision was approved by the Committee in October 2022; it added to the comment.

This instruction is drafted for violations of § 945.03(1m)(e). It is set up to include either two or three elements, depending on whether the alleged violations took place on a licensed premises. The two element version should be used for offenses on non-licensed premises; setting up or collecting the proceeds of a single machine violates the statute in that situation. The three element version should be used either when the charge identifies the site as a licensed premises or evidence is introduced to that effect. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty applies only if six or more machines are involved.

1. The bracketed alternative supported by the evidence should be selected. If the evidence supports both alternatives, both may be submitted, joined with "or." The Committee concluded that jury agreement on one alternative or the other is not required; the alternatives are believed to be like the "use or threat of force" required for robbery – see Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981); Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981).

2. The instruction is set up to include either two or three elements, depending on whether the alleged violations took place on a licensed premises. The two element version should be used for offenses on non-licensed premises; setting up or collecting the proceeds of a single machine violates the statute in that situation. The three element version should be used either when the charge identifies the site as a licensed premises or evidence is introduced to that effect. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty applies only if six or more machines are involved.

3. Wis. Stat. § 945.01(3) does not further define the term "consideration." However, the Wisconsin Supreme Court has applied the definition provided in Black's Law Dictionary (11th ed. 2019), and concluded that it is consistent with the meaning of consideration in common law. See Quick Charge Kiosk LLC v. Kaul, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944 N.W.2d 598. See also, DOR v. River City Refuse Removal, Inc., 2007 WI 27, ¶¶50-51, 299 Wis. 2d 561, 729 N.W.2d 396, for a discussion on various formulations Wisconsin courts have utilized to define consideration.

4. This is based on the definition provided in § 945.01(3)(a). The Committee concluded that "device" should be substituted for the statutory term "contrivance." Subsection (3)(b) provides three exceptions. The instruction addresses one of the exceptions – an amusement device rewarding the player exclusively with free replays. See text at note 5.

One of the bases for the defendant's challenge to the definition of "gambling machine" used in State v. Hahn, 221 Wis.2d 670, 586 N.W.2d 5 (Ct. App. 1998) [Hahn II], was to the word "contrivance," which

is not used in this instruction. Hahn II held that the portion of the statutory definition referring to "affording an opportunity . . ." and "automatically paid by the machine . . ." is not ambiguous. Relying on the words' usual meanings, the court held that "this portion of the statute requires that the machine, or contrivance, has a role in providing the opportunity to obtain something of value, but that something of value need not be provided by the machine alone without external influence or control." 221 Wis.2d 670, 682.

A machine is not exempt from this definition simply because it has uses other than illegal gambling. As the Wisconsin Supreme Court noted in Quick Charge Kiosk LLC, "Wisconsin Stat. § 945.01(3) does not define a gambling machine as a contrivance whose sole use is gambling. It says the opposite, namely, that a 'gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance.' (emphasis added)." Quick Charge Kiosk LLC, supra, at ¶21. Therefore, the fact that a machine has non-gambling features, such as cellphone charging capabilities or limited free use functions, does not negate the fact that the results of its games are determined completely by chance. The same reasoning applies to machines that offer preview features that allow players the ability to determine in advance the outcome of any particular game. See JD Prime Games Kiosk, LLC v. DOR, 2022 WI App 6, ¶¶14-16, 400 Wis.2d 499, 969 N.W.2d 778.

5. The material in brackets is based on the state's requested instruction in State v. Hahn, 203 Wis.2d 450, 453, fn. 3, 553 N.W.2d 292 (Ct. App. 1996). It was not expressly approved or disapproved by the court in Hahn, but the Committee concluded it was a correct interpretation of the phrase "determined by chance, even though accompanied by some skill."

In Hahn II, the court explicitly adopted the equivalent of the bracketed material: the phrase means that "chance rather than skill must be the dominant factor controlling the award." 221 Wis.2d 670, 679. The court relied in part on the interpretation of similar language in the lottery statute, as interpreted in State v. Dahlk, 111 Wis.2d 287, 330 N.W.2d 611 (Ct. App. 1983).

6. This is based on the exception to the definition of "gambling machine" set forth in § 945.01(3)(b)2. It was discussed in State v. Hahn, 203 Wis.2d 450, 553 N.W.2d 292 (Ct. App. 1996). Arcade games, such as pinball machines and Pac Man fall under this exception. See JD Prime Games Kiosk, LLC v. DOR, 2022 WI App 6, ¶15, 400 Wis.2d 499, 969 N.W.2d 778.

7. See note 1, supra.

8. This is based on the holding in State v. Hahn, 203 Wis.2d 450, 455, 553 N.W.2d 292 (Ct. App. 1996).

9. The third element should be added for violations that took place on a licensed premises. In some cases, the charge may indicate as much; in others the issue may be raised by the evidence. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty then applies only if six or more machines are involved.

The statute sets this up by providing, in sub. (2m), an exception to the generally applicable criminal penalty. The Committee concluded that this should be handled in the same manner as similar statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace

officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See, State v. Williamson, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for licensed premises are likely to be determined by pretrial motion. The Committee concluded that it is not an issue at trial until there is some evidence of the existence of a valid license. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). This requires, in this situation, proof that six or more machines are involved.

10. See note 2, supra.